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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL BROADCASTING COMPANY, INC.,
Petitioner,

v.

FRANK HERMAN AND FRANK MULLANEY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF

Petitioner, National Broadcasting Company, Inc. ("NBC"), submits this Supplemental Brief pursuant to Rule 22.6 because of this Court's decision in *Trans World Airlines, Inc.* v. *Thurston,* 53 U.S.L.W. 4024 (U.S. Jan. 8, 1985), which was announced after its Petition for Certiorari was filed.

In *Thurston,* this Court established the proper legal standard for determining what constitutes a "willful" violation under the liquidated damages provision of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 626(b). The Court held that a violation of the Act is willful if

the employer "either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." 53 U.S.L.W. at 4028. A standard under which a violation of the Act is willful if the employer "simply knew of the potential applicability of the ADEA" — the "in the picture standard" — was rejected. *Id.*[1]

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[1] This Court left open whether the same standard applies to the extended statute of limitations for willful violations under Section 6(a) of the Portal-To-Portal Act, 29 U.S.C. § 255(a). Section 6(a), which applies to ADEA violations, 29 U.S.C. § 626(e)(1), extends the statute of limitations from two years to three years if the violation is "willful." In addition to the Seventh Circuit in the instant case (App. 4a), most courts of appeals have applied the same willfulness standards to both the liquidated damages provision and the three-year statute of limitations. *See, e.g., EEOC* v. *Prudential Federal Savings & Loan Association,* 741 F.2d 1225, 1233 (10th Cir. 1984), *judgment vacated and remanded for further consideration in light of Thurston,* 53 U.S.L.W. 3506 (U.S. Jan. 14, 1985); *Spagnuolo* v. *Whirlpool Corp.,* 641 F.2d 1109, 1113-1114 (4th Cir.) *cert. denied,* 454 U.S. 860 (1981); *Hedrick* v. *Hercules, Inc.,* 658 F.2d 1088, 1096 (5th Cir. 1981); *Wehr* v. *Burroughs Corp.,* 619 F.2d 276, 282-283 (3rd Cir. 1980). *Contra Kelly* v. *American Standard, Inc.,* 640 F.2d 974, 979 (9th Cir. 1981).

ARGUMENT

1. The Court of Appeals' Finding of Willfulness Is Highly Suspect Under Thurston.

NBC has petitioned for review (or summary reversal) of the Seventh Circuit's decision reversing summary judgment in its favor on claims of willful discrimination under ADEA,[2] because the standard adopted by the Court of Appeals is contrary to *Texas Department of Community Affairs* v. *Burdine,* 450 U.S. 248 (1981), and would permit improper judicial second-guessing of an employer's business judgments. This Court's *Thurston* decision provides another compelling reason for reviewing and overturning that decision.

In the instant case, the Court of Appeals applied the ADEA liquidated damages standard for a willful violation to NBC's conduct in rejecting respondents' applications for employment, citing *Syvock* v. *Milwaukee Boiler Manufacturing Co.,* 665 F.2d 149, 156 (7th Cir. 1981). (App. 4a.) In its only discussion of this issue, the court below held that "NBC, which posted ADEA notices and employed an ADEA compliance officer, was in no position to plead ignorance of the law." *(Id.)* Thus, NBC's knowledge of and compliance with ADEA, without more, were deemed sufficient to establish a willful violation of the Act for purposes of the extended (three-year) statute of limitations, 29 U.S.C. § 626(e)(1).

In *Thurston,* this Court struck down a similar decision with respect to the willfulness standard for liquidated damages. A broad, "in the picture" standard, was rejected because it would result in a finding of willfulness in almost every case. "*As*

[2] The decision below upheld partial summary judgment for NBC on respondents' claims of nonwillful discrimination for failure to comply with ADEA's two-year statute of limitations. This aspect of the Court of Appeals' decision is the subject of a Cross-Petition for Certiorari in No. 84-1133.

employers are required to post ADEA notices, it would be virtually impossible for an employer to show that he was unaware of the Act and its potential applicability." 53 U.S.L.W. at 4028 (emphasis added).

Precisely the same reasoning applies to the decision of the court below. A standard of "willfulness" measured only by an employer's awareness of the Act would result in an extended statute of limitations in every case. Yet that is exactly what the decision below mandated.

Respondents never offered any proof that NBC had violated ADEA "knowingly" or "recklessly" in rejecting their applications for the positions they sought. The *only* finding of the Court of Appeals on this point was that NBC was aware of ADEA, had taken steps to enforce it, and thus "was in no position to plead ignorance of the law." (App. 4[illegible]) Accordingly, NBC's knowledge of and compliance with ADEA established a willful violation as a matter of law.

In *Thurston,* the court below similarly misapplied the willfulness standard and this Court reversed. 53 U.S.L.W. at 4028. Whether the Seventh Circuit here incorrectly adopted an "in the picture" standard or misapplied the *Syvock* standard, the decision below — holding that NBC's compliance with ADEA established a willful violation as a matter of law — cannot be squared with this Court's decision last month in *Thurston.*

2. **Summary Disposition Is Warranted.**

Petitioner suggested in its Petition for Certiorari (at pp. 13-14) that summary disposition may be warranted. This Court's intervening decision in *Thurston* provides an additional reason for summary disposition. The court below employed a liquidated damages standard for willfulness. In holding that an employer's conduct was willful by virtue of posting ADEA notices and employing an ADEA compliance officer — in short, simply because it *complied* with the Act — the decision below

would mandate a finding of willfulness in *every* case. In *Thurston,* this Court unanimously rejected such a definition of willfulness for that identical reason. Because the decision below is fundamentally inconsistent with *Thurston,* summary reversal may be warranted. Rule 23.1; *see also Board of Trustees of Keene State College* v. *Sweeney,* 439 U.S. 24 (1978); *Chardon* v. *Fernandez,* 454 U.S. 6 (1981). In the alternative, petitioner respectfully suggests that the Court may wish to vacate the judgment and remand the case for further consideration in light of its *Thurston* decision. *EEOC* v. *Prudential Federal Savings & Loan Association,* 741 F.2d 1225, 1233 (10th Cir. 1984), *judgment vacated and remanded for further consideration in light of Thurston,* 53 U.S.L.W. 3506 (U.S. Jan. 14, 1985).

Respectfully submitted,

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